In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 694

ROBERT M. PAGANO, PETITIONER

v.

SAMUEL A. MARTIN AND HOWARD E. MINITER, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–9a) is reported at 275 F. Supp. 498. The per curiam opinion of the court of appeals (Pet. App. 10a–11a) is reported at 397 F. 2d 620.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1968. The time for filing a petition for a writ of certiorari was extended by the Chief Justice, to and including October 29, 1968. The petition was filed on October 28, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

326-566—68

QUESTION PRESENTED

Whether a Special Evaluation Report concerning the performance of an enlisted man, made by his Commanding Officer and Executive Officer upon his transfer from a naval vessel, was within the outer perimeter of their duties as federal officials and hence privileged under *Barr* v. *Matteo,* 360 U.S. 564, in a defamation action against the officers.

REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Bureau of Naval Personnel Manual are set out in the Appendix, *infra.*

STATEMENT

As set out in detail in the district court opinion (Pet. App. 1a–3a), petitioner, a Navy radarman, had received a good rating report from his commanding officers, respondents here, in mid-December of 1966, when a routine periodic rating was due. Shortly thereafter, petitioner left the ship on leave. This leave was twice extended for emergency reasons; as petitioner was to have been transferred from the ship shortly and the ship had set to sea, the effect of these extensions was that he did not return to it. When his papers were forwarded from the ship, they included a new rating report, dated February 2, 1967. This report specified various deficiencies in petitioner's relationships with officers and performance of his duties, and did not recommend him for reenlistment;[1] a recommendation made

[1] The report stated (R. 8):

"In his short tour of duty aboard this ship PAGANO quite often failed to demonstrate the qualities of leadership expected

simultaneously with the December report, that petitioner be considered for advancement and competitive examination, was also withdrawn at this time. Asserting that his Navy career was thus effectively ended, petitioner brought this suit for libel; his complaint alleged that the February report was false and malicious, and that the respondents lacked authority to file it under Naval Rules and Regulations. Respondents, claiming that the report was privileged, *Barr* v. *Matteo,* 360 U.S. 564, moved for summary judgment. On the record thus created, the district court stated that "the reports in this case appear harsh, without much outward foundation, and far-reaching," but found that the officers had authority to make the reports, accepted the claim of privilege, and granted respondents' motion for summary judgment on that basis (Pet. App. 9a). For the same reason, the court of appeals affirmed.

ARGUMENT

The courts below were correct. Since in this action petitioner seeks money damages through a libel action,

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of a first class petty officer. He aired his complaints about his command's policies in front of his subordinates whenever he felt he had been treated unfairly. Petty Officer PAGANO possesses a great deal of energy, and when this energy was channeled to serve this command the results were satisfactory, but too often he diverted his efforts toward getting his own way. On at least one occasion he broke the chain of command to register a complaint. On occasion he raised undue objections to orders given him as he felt his way of doing things was better. His professional performance attitude and capabilities were extremely marginal and in general of the E–4 level. His attitude was in general bad for morale. He is not recommended for reenlistment in the future."

the controlling question is whether the report was within the "outer perimeter" of respondents' duties and therefore absolutely privileged under this Court's holding in *Barr* v. *Matteo, supra.*

The focus of inquiry in determining this question is whether the actions complained of had "more or less connection with the general matters committed by law to [the official's] control and supervision." *Spaulding* v. *Vilas,* 161 U.S. 483, 498; *Barr* v. *Matteo, supra,* 360 U.S. at 573; *Norton* v. *McShane,* 332 F. 2d 855, 861–862 (C.A. 5), certiorari denied, 380 U.S. 981; *Denman* v. *White,* 316 F. 2d 524, 529 (C.A. 1). The chapter of the Manual of the Bureau of Naval Personnel dealing with personnel evaluation begins as follows: "The Enlisted Performance Evaluation System is used: (a) to determine eligibility of an individual for reenlistment * * *." To this end it explicitly makes officers in command positions, such as respondents, "responsible for the performance evaluation of all personnel assigned" and for the filing of periodic reports such as the December report on petitioner. (Paras. 3, 6, 8(a)2.c.) It also authorizes "special" evaluations to "be made at any time when the individual's performance indicates that special cognizance should be taken of an outstanding occurence, either meritorious or derogatory" (para. 8(b)(4)),[2] and states that "Com-

[2] Petitioner appears to assert that such a "special evaluation report" could be made on his transfer only if 90 days had elapsed since the last report. The Manual states that a special report "shall be submitted" in such a case, Para. 8(b)2, but that it "may also be made" in the circumstances described in the quoted passage. Thus, petitioner's allegation that factual matters remain to be resolved concerning the affidavit of Captain Palkovic, a senior navy officer, is irrelevant; the provi-

manding officers may make memorandum entries on Page 9 [of the enlisted man's service record] for any reason which they consider appropriate."

These provisions leave no doubt that the making of a special evaluation upon a seaman's leaving the vessel, and of a recommendation concerning his reenlistment, is fully authorized as part of the respondents' official duties. An officer "responsible for the performance evaluation of all personnel assigned" could well be considered derelict in his duties if he failed to inform the Navy that someone just transferred from his command had been bad for morale, as respondents reported.[3]

Petitioner's intricate argument that such a report should not have been submitted at such a time is in addition founded on an approach fundamentally inconsistent with the "outer perimeter" aspect of the *Barr* holding. If immunity turned upon whether actions complained of were in technical compliance with regulations, that "might appreciably inhibit the fear-

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sions of the Manual leave ample room for the practice here followed.

[3] Nor is there merit to the contention that respondents were under orders "to forward petitioner's orders and records to the Naval Station and nothing more" (Pet. 15). Nothing in the messages to the vessel requesting petitioner's records or in the Manual supports petitioner's claim that respondents' authority to submit an evaluation of his performance on board ship ceased when they were first asked to forward his papers. A request by the Navy for the transmittal of the papers of a transferring enlisted man scarcely could be construed as an instruction to keep the Navy in the dark about significant factors in his performance.

less, vigorous, and effective administration of policies of government." *Barr* v. *Matteo, supra,* 360 *U.S. at* 571.

Since making the report complained of fell within the general scope of respondents' duties, it was privileged. Under *Barr* v. *Matteo, supra,* the privilege is absolute; allegations of malice cannot defeat it. 360 U.S. at 575.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
JOHN C. ELDRIDGE,
WALTER H. FLEISCHER,
Attorneys.

NOVEMBER 1968.

APPENDIX

BUREAU OF NAVAL PERSONNEL MANUAL (1959), PART C, CHAPTER 7

C–7821. ENLISTED PERFORMANCE EVALUATION

(1) The Enlisted Performance Evaluation System is used:

(a) To determine eligibility of an individual for reenlistment, for honorable discharge, and for award of Good Conduct Medals.

(b) To permit the commanding officer to influence positively the advancement opportunities of outstanding individuals.

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(3) Commanding officers and officers in charge are responsible for the performance evaluation of all personnel assigned.

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(4) * * * *Evaluations must be based objectively on the individual's demonstrated performance and his abilities as compared to established Navy standards and the performance of his contemporaries.* It is of the utmost importance that evaluations be completely frank in reporting the performance of the individual. It is necessary that an individual's shortcomings, such as alcoholism or other unreliability producing deficiencies, be reported. Such deficiencies can be of vital importance in the selection of personnel for duty assignment, advancement, etc. * * *

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(6) Commanding officers must ensure that at least one Report of Enlisted Performance Evaluation

(NAVPERS 792) for each marking period, either regular or special, is made for all enlisted personnel under their comand and that the numerical results of such evaluation are entered in each individual's service record as of the prescribed date.

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(8) This paragraph defines the types of evaluation and establishes general guidelines governing their submission.

(a) A *regular* Report of Enlisted Performance Evaluation (NAVPERS 792) is one which is submitted annually or semiannually as indicated below and which covers the entire evaluation period or a significant portion thereof:

Pay Grade:	*Required Report of Enlisted Performance Evaluation*
E-1, E-2, E-3	16 March and 16 September
E-4	16 April and 16 October
E-5	16 May and 16 November
E-6	16 June and 16 December
E-7	16 January
E-8, E-9	16 February

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c. The completed original and duplicate NAVPERS 792 shall bear the signature of the commanding officer, except that the commanding officer may delegate such authority to the executive officer or department heads, provided such officers are of the grade of LCDR or above.

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(b) A *special* Report of Enlisted Performance Evaluation (NAVPERS 792) is one which is submitted at some time in the reporting period other than the prescribed reporting date for a regular evaluation. Special evaluation shall be submitted under the following conditions:

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